

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**PLAINTIFFS' MOTION FOR ENTRY OF A PARTIAL ESI PROTOCOL,
PROTECTIVE ORDER, DEPOSITION PROTOCOL ORDER, 502(D) CLAWBACK
ORDER, AND ORDER REGARDING VIRTUAL DEPOSITIONS**

Plaintiffs, through counsel, move the Court for an order granting entry of a partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions, attached hereto as Exhibits 1, 2, 3, 4, and 5, respectively. Plaintiffs further move the Court to set a deadline of August 27, 2021, for the Parties to file a more fulsome, agreed-upon ESI Protocol, or competing versions in the event they cannot agree. Plaintiffs move unilaterally due to Defendants' general unresponsiveness, despite the Parties' August 13, 2021, Stipulation in which they agreed to file the attached documents by August 20, 2021.

In conjunction with this request, Plaintiffs note that their proposed Protective Order departs slightly from the District's form Order and, accordingly, Plaintiffs further move for entry of their Protective Order as modified from the District's form Order. The modification is minor, adding a sentence about insurance requirements at the request of Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical

Services, and a parallel sentence to similarly benefit Plaintiffs. The overall purpose and protections of the form Order remain undisturbed and, thus, for good cause, the Court should enter the Protective Order attached hereto as Exhibit 2.

In support, Plaintiffs state the following:

1. On December 1, 2021, Plaintiffs mailed letters to Defendants regarding their duty to preserve documents related to this litigation. The letters included an attachment, titled “Exhibit A,” regarding the format of production Plaintiffs anticipated seeking for all ESI in this case. In other words, Exhibit A is a partial ESI protocol as it governs only the format of production. (Schladt Decl. ¶ 3.)

2. On June 21, 2021, the Parties held a meeting pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. At this meeting, the Parties discussed several documents related to the Joint 26(f) Report they anticipated filing with the Court, including a format of production for ESI, a Protective Order, a Deposition Protocol Order, a Clawback Order, and an ESI Protocol. Prior to the June 21 meeting, Plaintiffs emailed Defendants another copy of Exhibit A for discussion. (*Id.* ¶ 4.)

3. On June 29, 2021, Plaintiffs emailed Defendants and attached an updated version of the Parties’ Joint 26(f) Report for Defendants’ review. The proposed Report included a deadline of August 13, 2021, for the Parties to file an agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI. (*Id.* ¶ 5.)

4. On July 6, 2021, Plaintiffs emailed Defendants and included proposed attachments to the Parties’ Joint 26(f) Report for Defendants to review. The attachments included the Order Setting Deposition Protocol, a Stipulation for Virtual Depositions, an Agreed Order Governing the

Inadvertent Disclosure of Documents or Other Material Under Rule 502(d), and a Protective Order.

(*Id.* ¶ 6.)

5. On July 7, 2021, Plaintiffs emailed discovery requests to Defendants, attaching Exhibit A. Plaintiffs later served their discovery requests and Exhibit A by mail on July 20, 2021.

(*Id.* ¶ 7.)

6. On July 14, 2021, Plaintiffs emailed Defendants to ask their respective positions on the attachments. (*Id.* ¶ 8.)

7. On July 16, 2021, Plaintiffs emailed Defendants about the Joint 26(f) Report draft and its attachments. Plaintiffs included the attachments once again and requested that Defendants respond with their edits as soon as possible. (*Id.* ¶ 9.)

8. On July 16, 2021, counsel for Defendant The Health Plan emailed Plaintiffs and stated he aimed to get back to Plaintiffs on Monday. (*Id.* ¶ 10.)

9. On July 19, 2021, counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services emailed Plaintiffs and stated she would look at the documents attached and get back to Plaintiffs on Wednesday or Thursday. (*Id.* ¶ 11.)

10. On July 27, 2021, Plaintiffs emailed Defendants and asked them for their positions on the attachments. (*Id.* ¶ 12.)

11. On July 27, 2021, counsel for Defendant The Health Plan stated he was not ready to comment on the ESI language/amendment. Counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services responded with edits to the proposed Protective Order. Defendant Ted Cheatham and

Defendant The Health Plan agreed to these edits on July 27 and July 28, 2021, respectively. (*Id.* ¶ 13.)

12. On July 28, 2021, the Parties filed their Joint 26(f) Report. The Report included an agreed-upon August 13 deadline for filing agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI. (*Id.* ¶ 14.)

13. On August 9, 2021, Plaintiffs emailed Defendants and requested edits to the attached Deposition Protocol Order, Stipulation for Virtual Depositions, Clawback Order 502(d), and Exhibit A. (*Id.* ¶ 15.)

14. On August 10, 2021, Plaintiffs accepted the edits to the Protective Order proposed by Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services. Plaintiffs then circulated new redlines to the Protective Order to all Defendants. Plaintiffs asked for a prompt response to the additional redlines to the Protective Order as well as the other attachments based on the quickly-approaching August 13 deadline. (*Id.* ¶ 16.)

15. On August 12, 2021, Plaintiffs emailed Defendants regarding the attachments and proposed a stipulation to a brief extension to August 20 due to Defendants' lack of communication. All Defendants agreed to the Stipulation, and the Parties filed it on August 13, 2021. (*Id.* ¶ 17.)

16. On August 12, 2021, Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agreed to Plaintiffs' proposed Deposition Protocol Order, Stipulation for Virtual Depositions, and Clawback Order 502(d). (*Id.* ¶ 18.)

17. On August 16, 2021, Plaintiffs circulated their proposed ESI Protocol to Defendants. (*Id.* ¶ 19.)

18. On August 17, 2021, counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agreed to Plaintiffs' proposed Protective Order and stated that, assuming all other counsel approve, her name may be attached to the Protective Order and e-filed. She further stated her clients were agreeable to complying with Plaintiffs' proposed format of production in Exhibit A, but that she wanted to ensure the decision was unanimous. To that end, she reserved her right to withdraw agreement if all counsel were unable to agree. She stated she was still reviewing Plaintiffs' proposed ESI Protocol with her clients. (*Id.* ¶ 20.)

19. No other Defendants responded regarding Plaintiffs' redlines to the proposed Protective Order, Exhibit A, or other attachments. (*Id.* ¶ 21.)

20. In light of Plaintiffs' numerous attempts to contact Defendants and obtain their positions on all of these attachments since June 29, and even earlier with respect to Exhibit A, Plaintiffs are filing their proposals with the Court in accordance with the Parties' Stipulation to Extend Case Deadlines. (ECF No. 76.)

21. Plaintiffs understand that Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agree with their proposed partial ESI Protocol titled Exhibit A (with reservations), Protective Order (with reservations), Deposition Protocol Order, Stipulation for Virtual Depositions, and Clawback Order 502(d). No other Defendants have weighed in on these attachments.

22. Accordingly, for all of the reasons stated above, Plaintiffs respectfully request that the Court enter Plaintiffs' proposed versions of the partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions, attached hereto as Exhibits 1, 2, 3, 4, and 5, respectively. Plaintiffs further request that the Court

set a deadline of August 27, 2021, for the Parties to file an agreed-upon ESI Protocol, or competing versions for the Court's consideration if they cannot agree. In Plaintiffs' view, the Parties have not had a fulsome discussion on the ESI Protocol beyond the format of production, attached hereto as Exhibit 1.

Dated: August 20, 2021

Respectfully submitted,

/s/ Walt Auvil

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